

A Tan Yang Long & Anor v Newacres Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24-10-89
SHANKAR J

29 AUGUST 1990

B *Contract — Agreement for sale and purchase of property — Application for declaration that plaintiffs not bound — Right to title deed — Capacity of plaintiffs to sue — Whether plaintiffs' claim limited to liquidated damages — Whether liquidated damages only payable when vacant possession is delivered — Fundamental breach of contract*

C This is an application for a declaration that the plaintiffs are no longer bound by an agreement for the purchase by them of an apartment in Taman Sri Muda Shah Alam and for various consequential orders. The defendant and Metroplex Leasing and Credit Corp Sdn Bhd ('Metroplex') are both subsidiaries or associates of Metroplex Bhd. **D** On 18 March 1985 the plaintiffs entered into a written agreement ('the agreement') to purchase the aforesaid apartment for \$89,400.

The said apartment was to be ready for occupation on or before 17 March 1988. By 1 June 1987 the plaintiffs had already paid the defendant \$44,700 to make up 50% of the purchase price. The plaintiffs had applied to Metroplex on 1 September 1985 for a loan. **E** In view of the special relationship of Metroplex to the defendant the money to be advanced by Metroplex was to be paid direct to the defendant and debited to the plaintiffs on terms which were reflected in what Metroplex chose to describe as a deed of assignment ('the assignment'). Ostensibly, the intent of the assignment was that the plaintiffs assigned all their rights under the agreement to Metroplex, **F** in return for a commitment from Metroplex that they would pay the defendant a sum of \$45,000 ('the loan') towards the plaintiffs' obligations under the agreement. Since there was no separate title to the apartment when the assignment was executed, it was provided that when at some time in the future a separate document of title came into existence, if money was still owing by the plaintiffs to Metroplex, **G** the plaintiffs would charge the said title to Metroplex as security for the moneys advanced by Metroplex to the defendant. Clause 3 of the assignment gave the plaintiffs an absolute right to redeem the loan at any time. The defendant did not complete the apartment by 17 March 1988 or at all.

H On 3 February 1989, the plaintiffs' solicitors wrote to the defendants to rescind the agreement and demand payment of the full sum paid by them on account, ie \$47,316. They also wrote to Metroplex giving notice of their rescission and directed them not to release any further sums to the defendant. They asked for the balance sum owing to Metroplex and were informed in writing that this was \$324.93. **I** This was remitted to Metroplex on 17 February 1989 by bank draft. Metroplex chose not to cash it despite their obligations under cl 3 of the assignment. Proceedings were filed in August 1989, claiming

\$47,316, interest thereon at 8% pa from 3 February 1989, damages and costs.

Held, allowing the plaintiffs' application:

- (1) At the time the assignment was executed there was no title to the apartment in existence. However, notwithstanding the purported assignment, cl 2.4 clearly shows that the legal right to the title deed continued to be vested in the plaintiffs who were only required to charge the property to Metroplex as and when the separate document of title was issued whilst remaining on record as legal owners. Therefore, the plaintiffs had the necessary capacity to sue.
- (2) In light of the fact that there was a redemption clause in the assignment and the plaintiff had, long before the action was filed, tendered the full amount of the loan (ie \$324.93) to Metroplex by bank draft on 17 February 1989, there was an immediate legal duty upon the part of Metroplex to reassign their rights under the agreement which they failed to do.
- (3) Although cl 13.2 of the agreement provides for liquidated damages of 8% of the purchase price for each day's delay till actual delivery of vacant possession, it does not say that such damages are not to be paid unless and until vacant possession is actually delivered. On the contrary it provides that such liquidated damages are to be calculated from day to day which implies a right to be paid on a day to day basis as long as the default continues.
- (4) The total failure of the defendant to give any credible assurances as to if and when the project would be completed amounted to a renunciation or abandonment of the agreement. Its conduct amounted to a fundamental breach of contract.

[Bahasa Malaysia summary]

Ini adalah satu permohonan untuk deklarasi bahawa plaintif tidak lagi diikat oleh satu perjanjian untuk pembelian sebuah pangsapuri oleh mereka di Taman Sri Muda Shah Alam dan untuk berbagai perintah sampingan. Defendan dan Metroplex Leasing and Credit Corp Sdn Bhd ('Metroplex') kedua-duanya adalah anak syarikat atau sekutu Metroplex Bhd.

Pada 18 Mac 1985 plaintif memasuki satu perjanjian bertulis ('perjanjian itu') untuk membeli pangsapuri tersebut untuk \$89,400. Pangsapuri tersebut patut sedia untuk diduduki pada atau sebelum 17 Mac 1988. Menjelang 1 Jun 1987, plaintif telah membayar defendan \$44,700 untuk membereskan 50% harga pembelian itu. Plaintif telah memohon kepada Metroplex untuk satu pinjaman pada 1 September 1985. Memandangkan hubungan khas di antara Metroplex dan defendan, wang yang akan didahulukan oleh Metroplex akan dibayar terus kepada defendan dan didebit kepada plaintif atas terma yang digambarkan dalam apa yang dipanggil oleh Metroplex sebagai surat-ikatan penyerahanhak ('penyerahanhak itu').

A Tujuan penyerahanhak itu ialah plaintif menyerahhak semua hak mereka di bawah perjanjian itu kepada Metroplex, untuk membalas satu janji Metroplex bahawa mereka akan membayar defendan satu jumlah \$45,000 ('pinjaman itu') untuk memenuhi kewajipan plaintif di bawah perjanjian itu. Oleh kerana tidak ada surat hakmilik yang berasingan kepada pangsapuri itu apabila penyerahanhak itu dilaksanakan, telah diperuntukkan bahawa apabila pada satu masa depan surat hakmilik berasingan wujud, jika wang masih terhutang kepada Metroplex, plaintif akan mencagarkan surat hakmilik itu kepada Metroplex sebagai cagaran untuk wang yang telah didahulukan oleh Metroplex kepada defendan. Fasal 3 penyerahanhak itu memberikan plaintif hak penuh untuk menebus pinjaman itu pada sebarang masa. Defendan tidak melengkapkan pangsapuri itu menjelang 17 Mac 1988 atau sama sekali. Pada 3 Februari 1989, peguamcara plaintif menulis kepada defendan untuk memansuhkan perjanjian itu dan menuntut pembayaran jumlah penuh yang telah dibayar oleh mereka atas akaun, iaitu \$47,316. Mereka juga menulis kepada Metroplex untuk memberi notis tentang pemansuhan mereka dan mengarahkan Metroplex supaya tidak melepaskan apa-apa jumlah lanjut kepada defendan. Mereka menanyakan baki jumlah yang terhutang kepada Metroplex dan telah diberitahu dalam tulisan bahawa ianya adalah \$324.93. Ini telah dihantar kepada Metroplex pada 17 Februari 1989 melalui draf bank. Metroplex membuat pilihan tidak menerima wang atas draf itu (cash the draft) tidak kira kewajipan mereka di bawah fasal 3 penyerahanhak itu. Tindakan dimulakan dalam Ogos 1989 untuk menuntut \$47,316, bunga di atasnya pada kadar 8% setahun dari 3 Februari 1989, ganti rugi dan kos.

F **Diputuskan**, membenarkan permohonan plaintif itu:

- G (1) Semasa penyerahanhak dilaksanakan tidak ada surat hakmilik kepada pangsapuri itu yang wujud. Namun demikian, tidak kira penyerahanhak yang didakwa itu, fasal 2.4 menunjukkan dengan jelas bahawa hak di sisi undang-undang kepada surat hakmilik itu terus menjadi hak plaintif yang cuma dikehendaki mencagarkan harta itu kepada Metroplex apabila surat hakmilik berasingan dikeluarkan, sementara mereka sendiri kekal sebagai tuanpunya di sisi undang-undang. Jadi, plaintif mempunyai kedudukan yang diperlukan untuk membuat guaman.
- H (2) Memandangkan hakikat bahawa terdapat satu fasal penebusan di dalam penyerahanhak itu dan plaintif telah, lama sebelum tindakan itu difailkan, membuat pembayaran penuh jumlah pinjaman itu (iaitu \$324.93) kepada Metroplex melalui draf bank pada 18 Februari 1989, satu tugas di sisi undang-undang timbul pada belah Metroplex untuk menyerahhak kembali hak mereka di bawah perjanjian itu dan mereka telah gagal berbuat demikian.
- I (3) Walaupun fasal 13.2 perjanjian itu memperuntukkan bayaran ganti rugi jumlah tertentu sebanyak 8% harga pembelian bagi setiap hari kelengahan berlaku sehingga penyerahan sebenar pe-

milikan kosong, namun ia tidak menyatakan bahawa ganti rugi sedemikian tidak harus dibayar kecuali dan sehingga pemilikan kosong sebenarnya diserahkan. Sebaliknya ia memperuntukkan bahawa ganti rugi jumlah tertentu sedemikian harus dikira dari sehari ke sehari dan ini membawa implikasi bahawa terdapat satu hak dibayar atas dasar sehari ke sehari selagi keingkaran berterusan.

- (4) Kegagalan sepenuh defendan memberi sebarang jaminan yang boleh dipercayai tentang jika dan bila projek itu akan diselesaikan berjumlah kepada penolakan (renunciation) atau peninggalan (abandonment) perjanjian itu. Kelakuannya berjumlah kepada satu keingkaran kontrak yang asas.]

Notes:

For cases on agreement for sale and purchase of land, see 3 *Mallal's Digest* (4th Ed) paras 1442-1497.

Cases referred to

- 1 *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (refd)
- 2 *Hoo See Sen & Anor v Public Bank Bhd & Anor* [1988] 2 MLJ 170 (distd)
- 3 *Law Ngei Ung & Anor v Tamansuri Sdn Bhd* [1989] 2 CLJ 181 (refd)
- 4 *Loh Wai Lian v SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1 (refd)
- 5 *Chye Fook & Phan Chooi Ling v Teh Teng Seng Realty Sdn Bhd* (Ipoh High Court Civil Suit No 22-38-87) (unreported) (folld)
- 6 *Phang Hon Chin v Nahar Singh* [1986] 2 MLJ 145 (refd)

S Sivasubramaniam (Siva Ram & Associates) for the plaintiffs.
SK Tan (Allen & Gledhill) for the defendant.

Cur Adv Vult

Shankar J: This is an application for a declaration that the plaintiffs are no longer bound by an agreement for the purchase by them of an apartment in Taman Sri Muda Shah Alam and for various consequential orders.

The defendant (hereafter referred to as 'Newacres') and Metroplex Leasing and Credit Corp Sdn Bhd (hereinafter referred to as 'Metroplex') are both subsidiaries or associates of Metroplex Bhd. Indeed all of them have their registered office at the same address, ie 10th Floor, Wisma Equity, No 150, Jalan Ampang, Kuala Lumpur.

On 18 March 1985 the plaintiffs entered into a written agreement ('the agreement') to purchase the aforesaid apartment for \$89,400. The agreement was subject to the Housing Developers (Control and Licensing) Act 1966 ('the Act'). The said apartment was to be ready for occupation in 36 months, ie on or before 17 March 1988 (cl 13.1). By cl 6 of the said agreement time was made the essence of the agreement. Newacres undertook to use its best endeavours to arrange a loan of up to \$62,580 for progress payments towards the purchase price.

A By 1 June 1987 the plaintiffs had already paid Newacres \$44,700 to make up 50% of the purchase price and a further \$2,616 in fees and disbursements.

B The plaintiffs had applied to Metroplex on 1 September 1985 for a loan. In view of the special relationship of Metroplex to Newacres the money to be advanced by Metroplex was to be paid direct to Newacres and debited to the plaintiffs on terms which were reflected in what Metroplex chose to describe as a deed of assignment ('the assignment'). This document is dated 10 June 1987 and it was prepared by Metroplex's solicitors. The assignment was a tripartite agreement to which the plaintiffs, Newacres and Metroplex were parties.

C Ostensibly the intent of the assignment was that the plaintiffs assigned all their rights under their sale and purchase agreement with Newacres to Metroplex, in return for a commitment from Metroplex that they would pay Newacres a sum of \$45,000 ('the loan') towards the plaintiffs' obligations under the sale and purchase agreement. Since there was no separate title to the said apartment when the assignment was executed it was provided by cl 2.4 thereof that when at some time in the future a separate document of title came into existence, if money was still owing by the plaintiffs to Metroplex, the plaintiffs would charge the said title to Metroplex as security for the moneys advanced by Metroplex to Newacres.

E Reading the assignment as a whole it is clear that even though it is called an assignment, it is not in fact an assignment in the sense in which that word is understood in legal parlance. Thus the plaintiffs continued to be fully liable to Newacres for the performance of all their obligations thereunder including their obligation to pay the balance of the purchase price. In no sense was Metroplex ever to become the owners of the apartment by virtue of the loan; so there was no assignment of the beneficial interest in the apartment by way of transfer. In short if this agreement could be called an 'assignment' at all, it was only an assignment by way of a charge. In reality it was nothing more than a loan agreement by which the plaintiffs pledged that when able so to do they would create a legal charge over the apartment to Metroplex provided moneys were still owing. In the meanwhile cl 3 of the assignment gave the plaintiffs an absolute right to redeem the loan at any time. It provided:

H If the assignor shall pay to the lender the loan, interest thereon and all moneys payable by the assignor to the lender under the memorandum in the manner prescribed in the memorandum and the transfer and the charge referred to in cl 2.4 shall not then have been effected, the lender will, at the request and cost and expense of the assignor, re-assign the sale and purchase agreement and the said property comprised therein to the assignor.

I Contrary to their obligations under the agreement Newacres did not complete the agreement by 17 March 1988 or at all. In fact it has not done so to this day!

On the first day of each month from October 1988 up to 1 February 1989 the plaintiffs sent a letter to Newacres with a copy to Metroplex demanding compensation for late delivery at the rate of 8% of \$89,400. Newacres and Metroplex did not even bother to acknowledge these letters.

On 3 February 1989 the plaintiffs' solicitors wrote to Newacres with copy to Metroplex. By this letter the plaintiffs' solicitors rescinded the sale and purchase agreement and demanded payment of the full sum paid by them on account, ie \$47,316. Newacres' response by letter dated 14 February 1989 was that any request for compensation was premature since delivery of vacant possession had not yet taken place, and on 22 February 1989, Newacres wrote further that the plaintiffs were not entitled to rescind.

On 3 February 1989, the plaintiffs' solicitors also wrote to Metroplex giving notice of their rescission and directed them not to release any further sums to Newacres. They asked for the balance sum owing to Metroplex and were informed in writing that this was \$324.93. This was remitted to Metroplex on 17 February 1989 by bank draft. But for reasons best known to them Metroplex chose not to cash it despite their obligations under cl 3 of the so-called assignment.

On their own accord the plaintiffs subsequently sent a further letter for compensation with a caution that legal action was being processed. Newacres chose to ignore this letter also.

These proceedings were filed in August 1989. It is a claim for the return of \$47,316, interest thereon at 8% pa from 3 February 1989, damages and costs.

Newacres have resisted this claim on a variety of grounds in which I found no merit. So I made an order in terms and directed that there be an enquiry as to the damages suffered by the plaintiffs.

This order was made in open court on 31 July 1990. Newacres subsequently applied for leave to appeal which I granted upon terms. My reasons now follow.

The defendant's first submission was that the plaintiffs have no locus standi by virtue of the 'assignment'. The defendant relied upon *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd*.¹ But whether an agreement amounts to an absolute assignment or whether it only purports to be by way of a charge, must be gathered from the four corners of the instrument itself.

In the case before me although cl 1 purported to amount to an assignment of the plaintiffs' benefits under the sale and purchase agreement, the fact of the matter was that at the time the assignment was executed there was no title to the apartment in existence although sub-division had been applied for. However notwithstanding the purported assignment cl 2.4 clearly shows that the legal right to the title deed continued to be vested in the plaintiffs who were only required to charge the property to Metroplex as and when the separate document of title was issued whilst remaining on record as legal owners. An absolute assignment would have resulted in the property being vested in the name of Metroplex in that event but that is not the case here.

Consequently I held that the plaintiffs had the necessary capacity to sue. Whilst there are some parallels with *Hoo See Sen & Anor v Public Bank Bhd & Anor*² the capacity of the plaintiffs in that case was not challenged.

Another reason why this submission fails is that even if the plaintiffs were under any kind of disability, (and in my view they were not, to the extent

A of their interest in the property), there was a redemption clause in the assignment and long before this action was filed the full amount of the loan, ie \$324.93 had been tendered to Metroplex by bank draft on 17 February 1989. There was an immediate legal duty upon the part of Metroplex to reassign their rights under the agreement which they failed to do. Equity in this respect must regard that as done which ought to have been done.

B Metroplex and Newacres were sister companies, so to speak, and their conduct in ignoring or brushing aside the pleas of the plaintiffs was callous. The locus standi was raised for the first time in these proceedings, and was clearly an afterthought.

C The substantial defence of Newacres is that the only remedy which the plaintiffs have is for liquidated damages as provided by the Act and nothing else. As to this, the defendant says that no matter how long delivery is delayed, no damages need be paid until the day when the building is completed and vacant possession is delivered. In the present context since it is not known when completion will take place, the defendant is urging that the plaintiffs must wait indefinitely. I find this submission devoid of merit, and quite unconscionable.

D Clause 13.2 of the agreement admittedly provides for liquidated damages of 8% of the purchase price for each day's delay till actual delivery of vacant possession but nowhere does it say that such damages are not to be paid unless and until vacant possession is actually delivered. On the contrary it provides that such liquidated damages are to be calculated from day to day which implies a right to be paid on a day to day basis as long as the default continues.

E In this case Newacres disregarded the plaintiffs' claims for liquidated damages. I do not need to consider what may have happened if they had paid it from time to time. Time was of the essence. By February 1989 there was a delay of nearly a year. I regard the total failure of Newacres to give any credible assurances as to if and when the project would be completed to amount to a renunciation or abandonment of the agreement. Their conduct amounted to a fundamental breach of contract. *Law Ngei Ung & Anor v Tamansuri Sdn Bhd*³ is very much in point.

F Mr Tan, who urged everything which could be said for Newacres, relied very heavily on *Loh Wai Lian v SEA Housing Corp Sdn Bhd*⁴ and particularly on the second paragraph at p 4 as supporting his proposition that the only remedy a purchaser has in these circumstances is a cause of action for liquidated damages, and that in all cases this cause of action does not accrue until the day when vacant possession is delivered because it is only on that day that the single sum to be paid can be ascertained and so only thereby becoming due and be sued for.

G With respect I am unable to agree that the case supports such a sweeping proposition. The obligation to pay liquidated damages is only one remedy for late delivery which if accepted will be in substitution of all others.

H I The judgment of Abdul Malek J in *Chye Fook & Phan Chooi Ling v Teh Teng Seng Realty Sdn Bhd*⁵ makes this abundantly clear, (see especially paras 9 and 16) and I would respectfully follow it here.

It was further submitted by Newacres that in asking for liquidated damages the plaintiffs waived their right to rescind. But the answer to this

is that the defendant did not recognize the existence of these demands, let alone the plaintiffs' right to make them.

As for laches and delay, admittedly the plaintiffs filed their action only in August 1988 — some 17 months after delivery should have been effected. I hold this is not fatal because it was reasonable for the plaintiffs to wait till February 1988 before rescinding a contract which the defendant had evinced an intention not to be bound by.

Consequently I gave judgment to the plaintiffs and ordered damages to be assessed. This was on 31 July 1990.

Leave to appeal where it is required should be promptly applied for. The defendants' application came before me four days before time would have run out. There was also an application for stay of execution.

Mr Sivasubramaniam opposed leave. He relied upon the observations of Edgar Joseph Jr J in *Phang Hon Chin v Nahar Singh*⁶ and also submitted that until the damages had actually been assessed any appeal would be premature.

With respect the order to pay \$47,316 with interest thereon was a final order which falls within s 68(1)(a) of the Courts of Judicature Act 1964. There are points of law here which it is desirable to have ventilated in the Supreme Court; so I gave leave.

I was not impressed by the defendant's supporting affidavit to the extent that it sought to adduce new evidence which was clearly available earlier or to raise points which were not raised before me. Leave is discretionary and may be granted upon terms. As I have earlier stated I found the conduct of Newacres and Metroplex unconscionable in deliberately keeping the plaintiffs out of their money and providing no credible assurances about their ability or willingness to complete the contract. I therefore ordered that the full sum of \$47,316 with interest up-to-date to be paid by the defendant to the plaintiffs within seven days.

There will be no stay of execution and the plaintiffs are at liberty to have their damages assessed so soon as they may be heard.

Application allowed.

Reported by Kevin Mathews

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